79-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79—

DIANE SALA,

Petitioner,

—against—

COUNTY OF SUFFOLK,

Respondent.

MOTION FOR EXPEDITED CONSIDERATION AND CONSOLIDATION, AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DIANE SALA,
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MOTION FOR EXPEDITED
CONSIDERATION AND
CONSOLIDATION

Petitioner Diane Sala respectfully moves, pursuant to Rule 43(5) of this Court's rules, for consolidation of the above-entitled case with Owen v. City of Independence, Missouri, 589 F.2d 335 (8th Cir. 1978), cert. granted, No. 78-1779, 48 U.S.L.W. 3189 (October 1, 1979) and for an expedited briefing schedule to the extent necessary to bring this case on for argument together with Owen.

Consolidation of these two cases is appropriate because both present the

same important question of law: whether a municipality may invoke a good faith defense to actions brought under 42 U.S.C. §1983, a question which this Court expressly left unanswered in Monell v. Department of Social Services, 436 U.S. 658, 701 (1978). Both cases involve an unconstitutional practice engaged in by a municipality, a §1983 claim for damages, and the assertion of a "good faith" defense by a municipality. Nevertheless, there are important differences in the facts of these cases, differences which counsel consolidation. Sala would present the Court with a fuller context for deciding questions concerning the existence and/or scope of a good faith defense for municipalities. For example, although Owen involves a procedural due process violation, Sala involves a substantive Fourth Amendment violation. Moreover, Sala, but not Owen, plainly involves a long-standing municipal policy, rather than an ad hoc decision, claimed to violate a constitutional right.

The differences between the cases,

as well as the advantage to full analysis of the questions raised which consolidation would afford, are set out more fully in the Petition for a Writ of Certiorari, infra, at 4.

Accordingly, petitioner respectfully moves, in the event the writ of certiorari is granted, that this case be consolidated with Owen v. City of Independence, Missouri, and expedited to the extent necessary for such consolidation.

Respectfully submitted,

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October 11, 1979

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-

DIANE SALA,

Petitioner,

against

COUNTY OF SUFFOLK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Diane Sala prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in this case on August 17, 1979. Petitioner also prays that the court consolidate this case with Owen v. City of Independence, Missouri, No. 78-779, cert. granted, Oct. 1, 1979, and expedite this case to the extent necessary for such consolidation. (See attached Motion for Consolidation and Expedition.)

OPINIONS BELOW

The district court opinion was delivered orally and is set forth in the Appendix, infra, at 10a. The opinion of the Court of Appeals for the Second Circuit is not yet reported and is set forth in the Appendix, infra, at 1a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Whether a municipality, found to have violated petitioner's Fourth Amendment rights by subjecting her to a general policy of routinely strip-searching all persons arrested, may invoke a good faith defense in an action brought under 42 U.S.C. §1983.

2. Whether, assuming a municipality is entitled to some form of good faith defense, such defense is co-extensive with the immunity of individual defendants, or, if not, in what ways it differs.

STATEMENT OF THE CASE

Petitioner brought this suit after she was subjected to an "insensitive, demeaning and stupid" (8a) strip search at the courthouse detention center for the Hauppauge district court. Petitioner had been charged with the petty offense of "harassment" upon the accusation of a neighbor. The summons notifying her of the harassment charge had been mailed to the wrong address, and when petitioner failed to respond, an arrest warrant was issued. Petitioner voluntarily surrendered to the Suffolk County police, but because of the outstanding warrant, she had to be arraigned in Hauppauge district court before she could be released. Petitioner had never been arrested before. (Tr. 343).

When petitioner arrived at the police precinct, a detective conducted a pat frisk and examined the contents of her bag. She was then handcuffed and taken to the detention center at the district court to await her imminent arraignment. It was there that she was strip-searched, despite her protests that she had already

been searched by the police:

> [The corrections officer] asked me to go inside the cell and remove all my undergarments ....[Then] she asked me to lift my sweater and my bra and turn it inside out and I did that. Then she told me to turn around with my back to her and squat on the floor and cough. I did that. Then she told me to stand up, bending forward from the waist and spread my legs apart. I did that, too. (Tr. 348).

This search was routine and was required of all detainees. Every individual was searched in exactly the same way (Tr. 325) no matter what the charge and even though there was no probable cause or even suspicion that the detainee possessed dangerous weapons or illegal contraband. (Tr.327).[1]

The strip search policy applied at the detention facility was the same policy developed for use in the Suffolk County jails, which are used to house convicted prisoners and arraigned pretrial detainees. (Tr.580). But the detention center differed in crucial respects from a jail. First, it was a day facility, where people were held only

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1. *See* district court opinion, *infra*, 12a, 14a, 19a, 23a, 24a.

for a few hours. Second, most persons it held had not been arraigned by a judge. The record as a whole demonstrates that no alternatives to these procedures had ever been considered or investigated.

After hearing testimony on the development and implementation of the strip-search procedure, the federal district court found that the County's legitimate interests could have been served by numerous less offensive alternative procedures: metal detection devices could have been installed (23a); pre-arraignment detainees held on petty offenses could easily have been separated from those charged with serious crimes (25a); and pat frisks could have been used to achieve security goals (23a).[2] The court also found that strip-searching was not more effective than the available alternatives (22a-23a). The court therefore ruled that the Suffolk County procedure failed to meet the Fourth

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2. Several other alternatives could be employed, and petitioner will brief those alternatives if *certiorari* is granted.

Amendment standard of reasonableness which demands a balancing of "the public interest and the individual's right to be free from arbitrary interference by law officers." (20a). The court permanently enjoined the County and its officials from strip-searching persons in petty offense cases, unless those persons had been arraigned or a peace officer found probable cause for conducting the search.

Despite her victory on the merits of her claim, petitioner was denied any monetary relief on the ground that the defendants, including the County, had acted in good faith. As its sole reason for affording that defense on the facts of this case, the court noted that no settled authority had yet found the particular type of search at issue in the case to be unconstitutional. (32a).

Petitioner appealed the ruling on good faith to the Court of Appeals for the Second Circuit, which affirmed, ruling that the defense of good faith was available to both the individual defendants and the County on the ground

that the ruling below established a new rule of law.[3] Petitioner now seeks review by Writ of Certiorari of her claim against the County of Suffolk.[4]

REASONS FOR GRANTING THE WRIT

This petition is accompanied by a motion urging that this case be consolidated with Owen v. City of Independence, Missouri, No. 78-1779, cert. granted, October 1, 1979, and expedited to the extent necessary for such consolidation. Both cases raise the question whether a municipality may invoke a good faith defense to actions brought under 42 U.S.C. §1983, a question which this Court expressly left unanswered in Monell v. Department of Social Services,

3. The defendants did not appeal the district court's legal ruling that the strip search policy, and the particular search at issue here, were unconstitutional. *See* Court of Appeals Opinion, 3a.

4. Petitioner originally brought suit against the County of Suffolk and three individual officers, Eugene R. Kelley, Police Commissioner; Philip F. Corso, Sheriff of the County of Suffolk; and Lorraine Weeks, an employee at the detention center. Review is sought solely on the claim against the County.

436 U.S. 658, 701 (1978), and whose importance the Court has already recognized by granting certiorari in Owen.

Certiorari and consolidation with Owen should be granted in this case for three reasons:

1. The facts of this case differ significantly from Owen and present the Court with differing considerations bearing on immunity. Analysis of the question raised by Owen, a question of pressing importance to the lower federal courts, would be aided by presentation in a broader context. In the past, the Court has frequently consolidated cases to enable more comprehensive analysis of difficult constitutional problems. See, e.g., Stone v. Powell, 428 U.S. 465 (1976); compare In re Primus, 436 U.S. 412 (1978), with Orhalik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); and compare Terry v. Ohio, 392 U.S. 1 (1968) with Sibron v. New York, 392 U.S. 40 (1968).

2. The injury to privacy interests

in petitioner's case is substantial and tangible. Owen, however, may present a claim for nominal damages if a due process hearing would not have mitigated Owen's stigmatization. Carey v. Piphus, 435 U.S. 247 (1978). The availability of a good faith defense should be decided in a case of palpable injury where both the need to compensate the injured plaintiff and the need to deter such constitutional injury may be stronger.

3. The nature of any good faith defense that may be available to a municipality should be formulated with reference to the policies underlying §1983 as well as immunity interests. Chief among the purposes of §1983 is deterrence from formulating, implementing and pursuing unconstitutional policies where it is reasonably predictable that such policies will infringe upon constitutional interests.

Sala, far better than Owen, presents a situation involving a deliberately arrived at, officially adopted policy, rather than an ad hoc decision. Courts

analyzing the interests underlying immunity for individual public officials have emphasized the special considerations that require immunity when prompt action must be taken, considerations which do not apply in Sala, where a longstanding policy is responsible for the constitutional injury.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE POLICIES UNDERLYING THE GOOD FAITH DEFENSE AND 42 U.S.C. §1983 DO NOT SUPPORT EXTENSION OF THE GOOD FAITH DEFENSE TO MUNICIPALITIES.

Adoption of a good faith defense for individual public officers had been justified on two grounds:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his office, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Neither of these rationales justifies extension of the good faith defense to municipal defendants.

As the Second Circuit correctly noted (6a), the first good faith defense rationale--the injustice of imposing damage awards on individuals--is completely inapplicable to municipalities. The municipality sued for promulgating an unconstitutional policy cannot claim to be in the position of an officer whose only choice was not to abide by a municipal policy and be "charged with dereliction of duty" or to follow an unconstitutional policy and be "mulcted in damages." Pierson v. Ray, 386 U.S. 547, 555 (1967). To the contrary, the municipality has the power to change the policy where the public officer does not, and the municipality is only liable where it is said to be responsible for its implementation.

Contrary to the Second Circuit's view (6a-7a), the second rationale for the good faith defense--deterrence in decision-making--is equally inapplicable to municipal defendants. The Court's opinions on absolute and qualified immunity for individual defendants dwell on the chilling effect that personal liability might have on an official's exercise

of discretion in his role as decision-maker. The Court has extended common law immunities to official to prevent "intimidation," in the course of official duties. Pierson v. Ray, 386 U.S. 547, 554 (1967); Wood v. Strickland, 420 U.S. 308, 319 (1975). Personal liability would "deter even the most conscientious...decision-maker from exercising his judgment independently and forcefully." 420 U.S. at 319-320. Thus, where individual officials are sued, liability has been limited to clear violations of constitutional rights. Wood v. Strickland, 420 U.S. at 322; Procunier v. Navarette, 434 U.S. 555, 565 (1978), or to cases where the individual official has acted with clear malice. Wood v. Strickland, 420 U.S. at 321. But such considerations are peculiar to personal liability.

In short, traditional rationales for affording a good faith defense do not apply to municipal defendants. Of equal importance, considerations of compensation for and deterrence of unconstitutional activity, the two traditional reasons supporting §1983 liability,

strongly counsel against its application to municipal defendants. As between the "responsible" municipality and the innocent victim, the policy underlying §1983 requires municipal compensation of the victim.[5] And by giving conscientious decisionmakers an "incentive to shun practices of dubious legality,"[6] the possibility of municipal liability will have the desirable effect of deterring policy-makers from violating constitutional rights in pursuit of municipal policy objectives.

In this case, for example, an appropriate concern about municipal liability would have encouraged county authorities to consider the various existing alternative security methods that are adequate and constitutional. The injury petitioner suffered would

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5. Cost spreading to "responsible" municipal defendants who "cause" constitutional injuries bears no relation to *respondeat superior* or other forms of vicarious liability not recognized as acceptable bases for damage compensation in *Monell* v. *Department of Social Services*, 436 U.S. at 693.

6. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975).

have been avoided. The result reached below, on the other hand, gives municipalities a "cost-free" violation of constitutional rights, and forecloses liability for every violation until a court has struck down an identical practice. Tort law does not afford tortfeasors similar defenses or impede its compensatory or deterrent purposes by immunizing actors from the forseeably dangerous consequences of their acts.[7] No reason appears why similar compensation and deterrence should not be secured by §1983. See generally, Monroe v. Pape, 365 U.S. 167, 182 (1961).

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7. As in the Opinion below, courts have applied this Court's "knew or should have known" standard from *Wood* v. *Strickland* restrictively. In this case, the Second Circuit applied this narrow reading by holding that, in the absence of on-point precedent, defendants should not have known that their policy was forseeably unconstitutional. In short, as *Wood* v. *Strickland* has been restrictively applied in the lower courts, §1983 plaintiffs must prove far more than "forseeability."

II. CERTIORARI SHOULD BE GRANTED TO DEFINE THE APPROPRIATE GOOD FAITH DEFENSE AVAILABLE TO MUNICIPALITIES, IF ANY GOOD FAITH DEFENSE IS AVAILABLE.

If the Court finds that a good faith defense is available to municipalities, the scope of the defense should be limited to reflect both the limited interest of a municipality in immunity from civil-rights actions and the purpose of §1983 to deter and compensate Constitutional violations.[8]

In applying the good faith defense, the Court of Appeals went far beyond protection of the county's legitimate interests. By adopting a good faith defense co-extensive with that for individual defendants based on the unsettled law principle of Wood v. Strickland, the Court of Appeals ignored the County's duty to forsee that its long-standing policy of indiscriminately strip-searching

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8. As noted in section I, *supra*, the municipality does not share the individual public official's interest in avoiding the Hobson's choice of disobeying rules or executing an unconstitutional policy. Its more limited interest is in not being unfairly held liable for damages it "causes" but for which it is not "responsible" under *Monell*, or which it could not reasonably forsee.

would needlessly and predictably infringe constitutional interests. As the district court found, such blatant intrusions of privacy were plainly unnecessary in light of the available alternative security measures.

The fact that the strip-search procedure did not violate specific precedent should not be dispositive of whether a municipal good faith defense is available. Settled specific constitutional precedent may be one factor to be taken into account. But the availability to a municipality of the good faith defense should be based upon the manner in which the county formulated and implemented the strip-search policy, what measures it took to consider the potential constitutional repercussions, and what alternatives were considered in light of the well-established constitutional interest in freedom from unreasonable searches.

Furthermore, this Court has interpreted §1983 to preclude derivative liability based on principles of respondeat superior. It should not accept the Court of Appeals' view that

municipalities have a derivative immunity, coextensive with the immunity of its employees and officers.

With very few exceptions, whenever a municipal employee executes an official policy, he or she will have a good faith defense.[9] Accordingly, if the good faith defense of a municipality were coextensive with that of the employee or officer, then mere adoption of a municipal policy would usually produce a good faith defense both for the officer and for the municipality. Such a result would "drain [Monell] of meaning," 436 U.S. at 701, and transform the very basis for municipal liability under Monell--where a municipal policy has "caused" and is "responsible" for constitutional injury--into a justification for complete immunity for all defendants. The rule of law adopted below effectively creates the "absolute" immunity for municipalities which Monell expressly precluded. 436 U.S. at 701.

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9. *See generally*, Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 Hofstra L.Rev. 501 (1977).

The very purpose of §1983 is to ensure that municipalities will exercise care whenever constitutional rights may be infringed by the implementation of municipal policies. This Court's decisions clearly require that whenever important governmental interests conflict with constitutional rights, policies must be designed to interfere with those rights as narrowly as possible. See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973) (privacy); Speiser v. Randall, 357 U.S. 513 (1958). Section 1983 requires municipalities formulating policies to further legitimate interests without unnecessarily risking constitutional injury, and renders them "liable to the party injured in an action at law" for "subject[ing]...any... person...to the deprivation of...rights... secured by the Constitution."

This is particularly true for searches and seizures, where the "reasonableness" of the procedures is the gravamen of the constitutional test. See, Newman, Suing the Lawbreakers: Proposals to Strengthen the §1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 459-462

(1978). Thus, extension of a good faith defense to municipalities must incorporate considerations of a duty of care commensurate with the intent of §1983 to impose on municipalities a meaningful responsibility for safeguarding constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted; this case should be consolidated with Owen v. City of Independence, Missouri, and expedited to the extent necessary for such consolidation; or, in the alternative, the Court should defer decision on the petition until the decision in Owen.

Respectfully submitted,

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* Counsel wish to acknowledge the substantial assistance of Nancy B. Morawetz, a second-year law student at New York University Law School.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1056—August Term, 1978.

(Argued May 17, 1979 Decided August 17, 1979.)

Docket No. 79-7009

DIANE SALA,

Plaintiff-Appellant,

—v.—

COUNTY OF SUFFOLK, PHILIP F. CORSO, Sheriff of the County of Suffolk, and LORAINE WEEKS,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
SMITH and TIMBERS, *Circuit Judges.*

Appeal from dismissal of action under 42 U.S.C. § 1983 against county for damages, by subject of strip search, in the United States District Court for the Eastern District of New York, George C. Pratt, *Judge.* Affirmed.

BENNETT E. ARON, West Hempstead, N.Y., *for Plaintiff-Appellant.*

EDWARD J. HART (Curtis, Hart & Zaklukiewicz, Merrick, N.Y., Wade T. Dempsey, of counsel), *for Defendants-Appellees.*

SMITH, *Circuit Judge:*

In this case an unfortunate series of circumstances and the mechanical application of an ill-considered county policy, since abandoned, led to an embarrassing strip search of a woman. Plaintiff Diane Sala had been accused by an individual of harassment, a minor violation in New York's hierarchy of offenses against the public weal, punishable by no more than fifteen days in jail. The summons, however, was mailed to the wrong address, and a warrant was issued for Sala's arrest because of her failure to respond to the misdelivered summons. When Sala was informed that a warrant had been issued, she voluntarily appeared at the Suffolk County Police Department. She was handcuffed and then searched by defendant Loraine Weeks, a correction officer. A "strip search," which included visual inspection of the genital and anal areas, but no contact, was conducted. This procedure was followed with all persons delivered to the custody of the Suffolk County Sheriff's Department at the Suffolk County District Court Detention Facility.

Plaintiff sued in the United States District Court for the Eastern District of New York for violation of her civil rights, 42 U.S.C. § 1983. The court, George C. Pratt, *Judge,* directed a verdict for the individual

defendants, Weeks and County Sheriff Philip E. Corso, and for the County, because of the absence of any proof of a lack of good faith, but granted injunctive relief to pre-arraignment detainees charged with petty offenses, attorney's fees of $15,000 and expenses of trial in the amount of $500 to plaintiff.

No appeal was taken from the grant of injunctive relief, the practice attacked having been abandoned by the County.[1] The award of attorney's fees and expenses of trial was appealed, but the appeal was abandoned, and this court dismissed it on February 23, 1979. We have before us only plaintiff Sala's appeal from the dismissal of her action for damages. We find no error in the result reached and therefore affirm the judgment.

The District Court properly directed a verdict for the individual defendants. The Supreme Court has enunciated a limited "good faith" official immunity to actions for damages brought under § 1983. See, *e.g., Procunier v. Navarette,* 434 555 (1978); *Wood v. Strickland,* 420 U.S. 308 (1975). The immunity standard requires that an individual defendant have acted in both "objective" and "subjective" good faith. *Id.* at 321-22. The objective element of the test would deny immunity to the defendants if "the constitutional right allegedly infringed by them was

1 Our resolution of the non-constitutional immunity issue makes it unnecessary for us to determine or to remand for reconsideration the question whether the County's strip search policy was unconstitutional in light of the Supreme Court's recent decision in *Bell v. Wolfish,* 47 U.S.L.W. 4507 (May 14, 1979). Unlike the petitioners in *Wolfish,* Sala had not yet been arraigned and therefore there had been no judicial determination that she should be committed to a detention facility. *Compare, id.* at 4514 n. 28, 4517. We intimate no opinion as to whether this factual distinction has any constitutional significance.

clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm." *Procunier v. Navarette, supra,* 434 U.S. at 562. The search of plaintiff Sala was conducted on October 9, 1974. We have neither discovered nor been directed to any case which, prior to that time, had held such a search to be a violation of any constitutional right. If the search here did infringe any of Sala's constitutional rights,[2] such rights were not "clearly established" at the time of the search.

The subjective element of the good faith test is also satisfied. Sala did not allege that the individual defendants acted with malice, nor was there any proof that they intended "to deprive the plaintiff of a constitutional right or to cause [her] 'other injury.'" *Id.* at 566.

We therefore affirm the dismissal of the damage claims against Corso and Weeks.

Sala's claim against the County presents a more difficult question. Although § 1983 "creates a species of tort liability that on its face admits of no immunities," *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976), the Supreme Court has held that the statute "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Id.* at 418. Such a reading has required the Court to "address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department." *Butz v. Economou,* 438 U.S. 478, 503

2 See note 1, *supra.*

(1978). The result of this balancing has been the formulation of a doctrine of official immunity, which we applied above, that provides government officials with varying degrees of protection against individual liability.

Both *Monell v. Department of Social Services,* 436 U.S. 658, 701 (1978), and *Turpin v. Mailet,* 579 F.2d 152, 166 (2d Cir.) (*en banc*), *vacated on other grounds,*—U.S.—, 99 S.Ct. 554 (1978), *decision on remand,* 591 F.2d 426 (2d Cir. 1979) *(en banc),* reserved decision on the scope of any municipal immunity against an action for damages caused by a deprivation of constitutional rights. Sala's claim against the County for damages requires that we begin to deal with this issue.[3]

The possibility of municipal liability under § 1983 after *Monell* implicates a number of the same competing concerns which the courts have had to weigh in the cases involving personal liability under § 1983. Our path in balancing these considerations is directed by the Supreme Court's declaration that its decision in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), "was intended to guide the federal courts in resolving this tension [between the individual's right to recover and the public interest in effective government decision making] in the myriad factual situations in which it might arise." *Butz v. Economou, supra,* 438 U.S. at 503.

In *Scheuer, supra,* 416 U.S. at 240, the Court noted that two "mutually dependent rationales" form

3 Several other courts have ruled on this question, with most of the recent cases holding that a good faith immunity applies to municipalities as well as to government officials. *E.g., Owen v. City of Independence, Missouri,* 589 F.2d 335 (8th Cir. 1978); *Ohland v. City of Montpelier,* 467 F. Supp. 324 (D. Vt. 1979); *Leite v. City of Providence,* 463 F. Supp. 585 (D. R.I. 1978) (dic-

the basis of the doctrine of official immunity from liability:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

The first of these concerns is in large part peculiar to the context of individual official immunity. The sense of injustice felt at the prospect of holding an individual official liable in damages when he acted reasonably and in good faith is greatly diminished when the liability is to be affixed to a municipality, even if its responsible officials acted reasonably in the light of then-existing law. Although "we are not insensitive to the financial plight of local governmental bodies" and wish to avoid "needlessly expand[ing] recovery at the expense of already overburdened taxpayers," *Turpin v. Mailet, supra,* 579 F.2d at 165, "fiscal considerations alone cannot stand in the way of the vindication of constitutional rights." *Id.* at 165 n. 38.

But the second rationale discussed in *Scheuer* retains more relevance in the context of municipal liability. The fear that the possibility of liability will unduly inhibit "the vigorous exercise of official

tum). *Contra, Shuman v. City of Philadelphia,* 47 U.S.L.W. 2720 (E.D. Pa. April 18, 1979); *see Hander v. San Jacinto Junior College,* 519 F.2d 273, 277 n. 1 (5th Cir. 1975).

authority," *Butz v. Economou, supra,* 438 U.S. at 506, is central to the concept of governmental immunity. As the Court said in *Scheuer, supra,* 416 U.S. at 241, "one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public." Although the detrimental effect that unforeseeable municipal liability may have on forceful decision making may be less direct than in the case of personal liability, it is clear that the threat of such liability may inhibit public officials from "mak-[ing] decisions when they are needed or . . . act[ing] to implement decisions when they are made." *Id.* at 241-42.

The protection of constitutional rights requires that municipalities, in the formulation of governmental "policies" and "customs," exercise their authority carefully and with the utmost concern for the effect which their decisions will have upon individuals. The role of municipal legal counsel in advising those responsible for decision making as to the legality of proposed actions is of course crucial.[4] But there are situations in which even the most able counsel will not be able to foretell the constitutional invalidity of a municipal policy. The Supreme Court has recognized in other contexts that, where a decision "establish[es] a new principle of law," it may be appropriate to give such a decision only prospective application. See *Chevron Oil Co. v. Huson,* 404 U.S.

4 Section 501(1) of the County Law of the State of New York provides, in relevant part:

> The county attorney shall be the legal advisor to the board of supervisors and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature.

97, 105-07 (1971). Such a rule strikes a proper balance in determining the scope of municipal liability under § 1983, at least where, as here, there is no evidence that any person responsible for formulating the municipal policy acted with malice or in bad faith. *See also, Cox v. Cook,* 420 U.S. 734, 736 (1975) (per curiam).

Where prior law does not suggest that a municipal policy is constitutionally infirm, it cannot be said in any meaningful sense that the municipality has been "at fault" in adopting that policy, and we do not believe that § 1983, enacted by a Congress accustomed to nearly absolute municipal immunity,[5] should be read to implement a doctrine of liability without fault.[6] After all, "it is not a tort for government to govern." *Dalehite v. United States,* 346 U.S. 15, 57 (1953) (Jackson, *J.,* dissenting), quoted with approval in *Scheuer, supra,* 416 U.S. at 241.

Our decision is a narrow one. The facts of this case present a situation wherein although the practice was insensitive, demeaning and stupid, there was no evidence of bad faith on the part of anyone

5 At common law, municipalities were for a time accorded the same absolute immunity from tort liability which states possessed. By 1871, when the predecessor of § 1983 was enacted, some states, such as New York, had recognized a distinction between "governmental" and "proprietary" acts, imposing liability only for the latter. *Monell v. Department of Social Services,* 436 U.S. 658, 720-21 (1978) (Rehnquist, *J.,* dissenting). *See Bailey v. City of New York,* 3 Hill 531 (N.Y. 1842); *see generally,* W. Prosser, THE LAW OF TORTS at 978-79 (4th ed. 1971).

6 *Cf. Monell v. Department of Social Services,* 436 U.S. 658, 681 n. 40 (1978) (Congress rejected the Sherman amendment to the Civil Rights Act of 1871, which would have "imposed damages without regard to whether a local government was in any way at fault for the breach of the peace for which it was to be held for damages.")

charged with formulating or implementing the municipal policy, and the case law as of the time of the incident involved here did not suggest that the practice of strip searching which apparently had long been followed by many governmental bodies, was unconstitutional. The practice has now been abandoned by the County. In such a situation, the public interest in careful, but forceful, governmental decision making requires that a municipality be afforded immunity from liability for damages under § 1983.

The judgment of the District Court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DIANE SALA, Plaintiff, -v- COUNTY OF SUFFOLK, EUGENE R. KELLEY, Police Commissioner, PHILLIP CORSO, Sheriff of the County and LORRAINE WEEKS, Defendants.	x	ORAL OPINION 75C486 (Honorable George Pratt)

THE COURT:...Sometimes as cases progress they take strange turns. In the processing of any law suit where the Jury is involved, the Jury has its function and the Court has its function. Always the function of the Court is to determine the law. The instructions that I give to the Jury is that it's their function to find facts. As you may have noticed throughout the development of this trial there are very few facts here which are in dispute and possibly some inferences to be drawn from the undisputed facts could be conflicting. Certainly the conclusions which Counsel would like to have drawn from the facts and the law intertwine, they disagree. But, in some cases the implications of the evidence which is before the Court and the Jury are so strong that it becomes the Court's duty to make a decision as a matter of law, which means in substance that

reasonable men and women could not disagree as to the determination made. This has become such a case and I have so indicated to Counsel that I am going to dispose of this case at this point on the law, which means that it will not be necessary and in fact it will not be possible for you to make a decision.

If we were all omniscient we could have saved you the five days you sat here during a busy Christmas Holiday. But nothing in life is quite that predictable and there is nothing as unpredictable as a law suit.

In any event, I'm about to make my decision disposing the various motions at the end of the case and as you will see that decision will dispose of the problems in as far as you might otherwise be concerned with them.

To begin with, we have had talk about such search procedures. The one with which we are specifically dealing here--before I do that, let me define some terms.

We have a pat frisk, which I interpret to be one whereby the hands of the searcher touch the body of the person searched, while the person searched keeps his clothes on. We have a strip search as a second type, which for purposes of this decision is defined as one where the person searched removes all or part of his clothing and the searchor [sic]observes him or her without touching.

We have a third kind, a strip search with a visual inspection of the anal and genital areas, still involving no touching.

And then we have a fourth kind which has

been referred to as an internal search, and I shall use that term as one which denotes where the searchor penetrates one or more of the body cavities of a person being searched, using fingers or implements of some sort.

Clearly, the one we are dealing with in this case is one whereby after a pat frisk is performed, the searchor requires the person being searched to lower his or her pants and underpants. In the case of females it is to squat and cough once or twice and in the case of both males and females, to turn their back to the searchor, then bend forward and spread their buttocks for a visual inspection of the anal and genital areas; there is no touching involved after the conclusion of the pat frisk.

I am sure you have all noted as I have that there is no set terminology for the kinds of searches that are performed. We have talked about visual searches of the rectum which apparently is an impossibility without some kind of touching to open up the sphincter muscles of the anus. We have talked about visual searches of the vagina, which is probably equally impossible without some aid. In the interest of accuracy and hopefully to refine some of the terminology in this growing area of the law, I will try to confine my terminology to visual inspection of the anal and genital areas, but forgive me if I slip up on occasion.

Now, what is our basic problem? Essentially it is whether a search of the third kind, that is a strip search combined with a visual inspection of the anal and genital

areas, when performed by personnel of the Sheriff's office in Suffolk County as a routine procedure with all persons delivered to their custody at the Suffolk County District Court Detention Facility at Happaugue, Suffolk County, New York, constituted a deprivation of the Constitutional Rights of these two Plaintiffs. [sic]

If the use of that procedure in the case of these two Plaintiffs was Unconstitutional, we have two subquestions in the action. A, whether the Plaintiffs are entitled to monetary damages from one or more of the Defendants as a result of the deprivation of their Constitutional rights, and B, whether the Defendant should be enjoined from continuing the procedure into the future in some or all circumstances.

Plaintiff Micallef has been charged in this case with having failed to pay a $15 traffic fine which had been levied after a plea of guilty to a speeding charge. A bench warrant was issued when she failed to pay the fine within the time the Court allowed her.

The other Plaintiff, Sala, had been charged by a sworn complaint of harassment, issued or filed by a neighbor. Harassment is classified under the New York State Penal Law as a violation punishable by no more than 15 days in jail. Based on that complaint and her failure to respond to a mailed summons which was apparently sent to the wrong address, a warrant was issued for her arrest.

I find nothing erroneous in any of the procedures involved in the issuing of either the bench warrant or the warrant for arrest.

Before we go any further, I should limit the issues of this case in the context of what it is not about. This case is not about internal searches. It is not about abusive or insulting conduct by Law Enforcement Officers. It is not about searches of any type when applied to offenders in custody on criminal charges such as felonies or misdemeanors; it is not about searches of any type when applied to prisoners who have been committed to custody by Court Order, whether for sentence, to await trial or to be held in protective custody; it is not about searches of any type when applied to a jail or prison for overnight confinement or longer; it is not about cross-sexual strip searches, that is men searching women or women searching men; it is not about the Eighth Amendment, cruel or unusual punishment.

Here we are not dealing with punishment, since neither of the Plaintiffs had yet been sentenced to any jail confinement and therefore could not legally be subjected to any punishment.

In basic terms, we're dealing solely with a search of the third type which I described, when applied as a routine procedure to persons taken into custody pursuant to a warrant for arrest or a bench warrant issued in connection with what is defined in the New York State Code of Criminal Procedure as a "petty offense," which would include any violation or any traffic infraction.

The action itself was brought under 42 U.S. Code 1983, one of the so-called Civil Rights Laws enacted not long after the Civil War. There is also a claim under the

Fourteenth Amendment to the United States Constitution, but I will discuss the case basically as if it were a Civil Rights Action under Section 1983 and at the end of this decision I have some comments with respect to the applicability of the Fourteenth Amendment.

Generally the analysis applicable to both 1983 and the Fourteenth Amendment is similar with a possible exception as the liability of a municipality that is a municipal corporation, under the Fourteenth Amendment. Up to that point, however, including the availability of the qualified immunity or good faith defense, I have concluded that the governing principles are very similar, if not the same.

Initially in this action there was a claim by the Plaintiff Micallef against Police Officer Albertson which rested upon theories that the entire bench warrant procedure was Unconstitutional, and secondly, that the Police Officer should have disregarded the Court's Order, that is, the warrant to arrest Plaintiff Micallef.

Both of these claims I dismissed at the end of the Plaintiff's evidence during one of the long waits which you had in the Jury Room. That aspect of the case has been concluded and was concluded earlier. I need say no more about it today.

Now, before me is the question with respect to the search procedure which has been described and involves the same Defendants, County of Suffolk, Mr. Corso, who was in 1974 the Sheriff, Mrs. Weeks who was the matron who performed the procedure and Mr. Kelly [sic] who was the Police Commissioner at that time.

I consolidated the two cases for trial because of the similarity of the issues presented, including (1) the question of the Constitutionality of the search procedure when applied to petty offenses, (2) the question of who was responsible for the use of that procedure in the absence of any claimed personal malice or vindictiveness in either case and (3) the Defendant's assertion of a qualified immunity based upon good faith.

Now, normally in a suit brought under Section 1983, in order to prove a claim, the burden is upon the Plaintiff to establish, by a preponderance of the evidence in the case, the following elements:

First, that the Defendants knowingly committed the act or acts or otherwise engaged in the conduct alleged by the Plaintiff.

Secondly, that the Defendants acted under color of law.

Third, that the Defendants' acts and conduct deprived the Plaintiff of Constitutional Rights.

Fourth, that the Defendants' acts and conduct were the proximate cause of the injuries and the consequent damage to the Plaintiff. Even if Plaintiff establishes all four of those elements, however, there may yet be no liability for damages if the Defendants, as an affirmative defense, establish that they acted in good faith and are thereby entitled to a qualified immunity from such liability.

Now, as I indicated to you earlier, the facts in this case are largely undisputed. As to the first element in the normal 1983 case that the Defendants knowingly committed the acts in question, it is not in dispute here. Everyone agrees as to what Mrs. Weeks did, and everyone agrees that Sheriff Corso was responsible for the procedures that were in effect in his office while he was there. He was the only person who could have changed them, and he did not do so.

The second element, that the Defendants were acting under the color of the law, this too is not in dispute. We're dealing with Government Officials who were carrying out their duties as they saw them.

The fourth element, that is whether the Defendants' acts and conduct were the proximate cause of the injuries claimed by the Plaintiffs, is there were Unconstitutional acts done, that is presumed to cause injury and to what extent would be a question of proof. However, in view of the disposition made here that issue need not be determined.

The third element, whether or not the Defendants' acts and conduct deprived the Plaintiffs of Constitutional Rights is a question of substantive law under the circumstances of this case, since we're not dealing with an individual act such as whether a Police Officer used excessive force in bringing a person into custody.

We are dealing, instead, with an established, recognized policy, and it becomes, therefore, an issue for the Court to determine the Constitutionality of that policy.

The affirmative defense of good faith normally would be a question for the Jury to determine. I have decided, however, that it is a question of law under these particular circumstances of this case. I have heard extensive argument by Counsel on the questions of Constitutionality and good faith. Before I turn to them, however, I would like to take care of Commissioner Kelly.

The argument has been made by Mr. Kelly's Counsel here that both complaints should be dismissed against Commissioner Kelly because he is in the Police Department and is not connected with the search procedures carried on by the Sheriff. It was noted recently by Judge Timbers of the Second Circuit Court of Appeals in McKinnon against Peterson, slip opinion decided December 15, 1977, "In this Circuit, (meaning the Second Circuit) personal involvement of Defendants in alleged Constitutional deprivation is a prerequisite to an award of damages under 1983," citing a series of cases.

I have determined as a matter of law that Commissioner Kelly was not sufficiently involved in the search procedures employed by the Sheriff's Department at the Suffolk County Detention Facility in Happaugue, to subject him to personal liability in this case. He did not create the procedure, he did not enforce it, and he could not have changed it in his role as Police Commissioner. There is no evidence that he was even aware that the procedure was being carried on until the circumstances of this case brought it to his attention, and on the witness stand he denied that he had any knowledge of the procedure.

Therefore, I will dismiss the complaint of each Plaintiff against Commissioner Kelly.

Now, let's turn to the question of Constitutionality. As I indicated this presents a question of substantive law for the Court to determine. If I were submitting the case to you for your decision on any of the issues, members of the Jury, I would have simply informed you that I found the procedure to be Unconstitutional as a matter of law, but in view of the disposition I'm making here by way of motion and ruling, that is not necessary. I'll explain that in some detail.

First off, there are no significant facts in dispute on the issue of Constitutionality. The search procedure used is not at issue, nor is the question of whether it was applied to each of these Plaintiffs. It clearly was applied to them and although today there developed some question as to whether the procedure is still being applied at the Happaugue Facility as a matter of routine, that does not bear upon the determination of Constitutionality, though it may affect possible injunctive relief.

The basic approach which I have taken to the question of Constitutionality is threefold. First, I view the management and operation of prison facilities as being primarily a matter for the prison authorities; here, for the Sheriff's Department.

Secondly, a prisoner retains all the rights of a citizen except those expressly or by necessary implication taken away from him by law.

Thirdly, I have assumed that pretrial detainees are not subject to the full exercise and substantial powers of prison officials to the same extent as would be sentenced prisoners. There is authority for that and I would cite Counsel to Wolfish against Levi.

A good approach to the Constitutional framework can be had through the language of Judge Oakes of the Second Circuit in Sostre against Preiser where he said " There was a time, of course, when prison inmates had no rights," citing Ruffin against Commonwealth, a Virginia case of 1871, which characterized prison inmates as, 'A slave of the State.'

Judge Oakes continued, "That time is past. Limitations on fundamental rights such as we are here concerne with must be supported by the legitimate and reasonable 'needs and exigencies of the institutional environment.' (citations) But even if the institutional purpose is legitimate and substantial, 'that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'"

To determine Constitutionality here we must balance competing conflicting interests in the context of the Fourth Amendment which guarantees every citizen against unreasonable searches. We have a test to determine what is reasonable from the Supreme Court in Commonwealth of Pennsylvania against Mincy, Decided December 5th, 1977, "Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."

Here on one side of the balance scale we have the intrusion into personal dignity and privacy in a way that for some people at least might cause serious emotional distress. A search of the type we are dealing with in this case, including the visual inspection of the anal and genital areas, has been characterized by various witnesses here, and by Judges in some other cases, as demeaning, dehumanizing, undifnified, humiliating, terrifying, unpleasant, embarrassing, repulsive, and signifying deep degradation and submission. It is probably all of these things to different people in greater or lesser degree.

On the other side of the balance scale we have the need for the safety of the persons in a prison, the correction officers, inmates and persons being searched. Defendants have attempted to justify the search procedure here on the ground that it is a search for dangerous contraband, such as drugs, money or weapons. (Parenthetically, in the context of a holding facility such as we have here, I tend to discount the problems with respect to money and drugs, due largely to an evaluation I reach later on with respect to the possibility of segregation of various offenders in a way which woudl prevent their transfer to someone within the security portion of the prison.

In any event, safety has been regarded by the Defendants as an over riding concern, as indeed it should be. A jail should be a safe place. It should be safe for the prisoners and should not include bodily injury inflicted by other inmates. Similarly, correction officials should not be required to expose themselves to any risk

of death or bodily injury which can reasonably be avoided. Finally, experience has shown that some people commit suicide while incarcerated. (Whether there is a causal connection between the incarceration and the suicide seems to be in dispute, based on the testimony of Dr. Rumdle, but to some degree at least a corrections officer must protect the prisoner from himself.) No one can reasonably quarrel with the objective of maintaining a safe detention facility.

The issue, therefore, focuses upon whether the means used here, the pat frisk combined with a strip search using a visual examination of the anal and genital areas, is rationally related to the objective sought. And if it is, as it would appear to be, then the question is whether that means is the least intrusive one reasonably available to achieve the objective.

Under these circumstances here, I have concluded that the search procedure is Unconstitutional, because, while it is rationally related to the objective sought, discovering weapons, it is not the least intrusive means which could accomplish the same result.

First, in a detention facility, persons are brought in on warrants. We are dealing here only with a detention facility, where persons are brought in on warrants for petty offenses. In such a facility and with such people there is not much motive for escape.

Secondly, under these circumstances there is little opportunity to plan the secretion of a weapon.

Thirdly, as I indicated before, we need not be particularly concerned with drugs or money, unless the subject is to be brought into the security area of the facility where it then might be passed to other prisoners.

Fourth, the search procedure itself does not reveal anything which is carried internally. Consequently, it is productive only if the object is partially internal and partially external or, if the object is strapped, taped, or otherwise secured in close proximity to the tenital[sic] area or between the buttocks where it could not be detected except by an unusually thorough pat search.

Fifth, modern technology in the form of metal detectors of various types, whether walk through ot hand held, would disclose metal weapons concealed on or in the body.

We have had testimony from Deputy Cornell about three specific instances of contraband discovered on prisoners: two of them, a razor blade and a pen, were discovered with a pat frisk, even though the razor blade was taped between the buttocks and the pen was taped between the legs. The third one, a gun, would have been found except that the pat search was perfunctory, not thorough; unfortunately it resulted in Deputy Cornell being shot. But the presence or the availability of the strip search procedure with a visual inspection was not an element in that incident. The procedure could have been performed, as could the pat search, but neither was done effectively enough to discover the gun.

Balancing all of these factors, I conclude

that Defendants' application of the search procedure of the third kind I described, as a matter of routine to all persons brought to the Happaugue Detention Facility on warrants to appear before a District Court Judge on petty offenses, has no reasonable nor rational basis, constitutes a denial of liberty without due process of law, violates the Fifth and Fourteenth Amendments, and also constitutes an unreasonable search in violation of the Fourth and Fourteenth Amendments of the Constitution.

Most of the objectives sought to be achieved by the Defendants in imposing the procedure could be obtained by an initial classification procedure whereby all persons brought to the Detention Facility upon warrants or directly from arrests without warrants on petty offense charges would be segregated from the security area of the facility so that prior to being taken before the Judge such a person could have no contact with other persons in the facility.

For convenience, I'll refer to such people as, "Prearraignment Detainees," although I recognize that the characterization is not accurate as to Plaintiff Micallef, because she had previously been arraigned and convicted. But her situation was similar to that of prearraignment because there was the possibility of a new violation based on her non-payment of the fine for which the Judge must decide whether or not to impose a more severe penalty. If such "Prearraignment Detainees" have no contact with postarraignment detainees and other prisoners, there would be no danger to the latter two groups, and there would be no threat to the security of the jail system.

"Prearraignment Detainees" are a very transient group from the point of view of the custodial personnel at the Happaugue Center. It would be almost impossible for them to plan an assault in advance of their being taken into custody and brought to that facility. Perhaps most importantly, however, there would be low motivation for them to attempt to escape or otherwise cause trouble with the personnel. I see no Constitutional impediment to searching such persons magnetically for weapons and possibly even subjecting them to a pat frisk.

In my opinion pretrial detainees on petty offenses could easily be segregated, and sent to a separate waiting room pending their entrance into the Court Room to appear before the Judge. After the Court appearance, they would either be released on their own recognizance or on bail, in which case there would be no need for jail security as to them, or if they are remanded to the custody of the Sheriff, then they would enter the security area of the jail, and they could be processed under those circumstances in the same way as any other prisoners under the Sheriff's jurisdiction.

Of course, whenever, because of the identity, demeanor or known record of a prisoners, or for any other sufficient circumstance, a correction officer has probable cause to believe that a person in custody may have a weapon concealed on his person, a strip search with a visual inspection would be permissible. Upon such occasions, the details of the probable cause should be recorded in writing upon a sworn statement. The record of the search should include the reasons, the circumstances and results of the search.

A copy should be given to the person searched and the record should be kept by the Sheriff's Department for future purposes.

I have assumed, but not determined, that upon a prisoner's first entry into the security area of the jail system he may properly be subjected to an intensive search including a strip search with a visual inspection. Until that point is reached, however, with "Prearraignment Detainees" on petty offenses, that type of strip search procedure is unnecessary for any legitimate purpose. Since it's only claimed purpose here, the security of the jail, can be supplied with alternative, more humane procedures, I find the procedure to be Unconstitutional as applied here.

Since the procedure is Unconstitutional, it may not continue. Until the testimony this morning it had appeared to me (perhaps I was not paying close enough attention to the testimony on previous days, but my clear understanding had been) that this procedure continued to date. There seems to be some question raised by the testimony of Chief Antonsic as to whether or not the procedure was discontinued in some, if not all, circumstances, as routine matter, beginning approximately one year ago. Whether or not an injunction will be entered cannot therefore be determined at this time.

Injunctive relief, however, is for the Court and not for the Jury and I will hold such further hearings on the question as may be called for by the circumstances.

In any event, the kind of injunction which

should be entered, assuming the procedure is continuing, is one which could not be determined without considerable input from the Suffolk County officials and perhaps from others. I'll discuss with Counsel later an appropriate procedure and timing for determining the necessary issues with respect to the injunction.

Plaintiff Micallef originally brought her action as a class action. Judge Bruchhausen of this Court, however, denied her motion for class certification, saying it was unnecessary in view of her claim for injunctive relief, since Defendants, who act as Government Officials, could reasonably be expected to comply with any final order of this Court. I urge the Defendants to cooperate willingly, as I'm sure they will, in developing a full fact picture which would enable me to determine whether or not an injunction will be necessary and if so, to determine an injunction which will embody an effective secure procedure for the Happaugue Facility which does not unreasonably and unnecessarily infringe upon the rights of the citizens of Suffolk County.

I turn then to the defense of good faith. Having found that the Plaintiffs' Constitutional Rights have been infringed by the strip search procedure when applied to them by Defendants acting under color of State Law, I must turn to the question of Defendants' potential liability to the Plaintiffs for monetary damages.

Defendants have raised a claim that they acted in these instances in good faith and

thereby are entitled to the qualified immunity defense which is available to Government Officials under Section 1983. Such a qualified immunity exists in varying scope, the variations being dependent upon the scope of discretion and responsibility of the officers and all the circumstances as they reasonably appeared at the time of the action or conduct on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of Government Officials for acts performed in the course of official conduct.

If the Defendants reasonably believed that the strip search with visual inspection performed as routine procedure was Constitutional, proper and carried out under the authority of valid regulations, statutes or policies, and if they acted in good faith on the basis of this belief, then the reasonable belief and the good faith action or conduct would constitute a defense to the Plaintiff's claims that they were deprived of Constitutional Rights by the strip search procedure, so as to entitle them to money damages, even though the policy calling for the procedure as a matter of routine in petty offenses may have been Unconstitutional.

Good faith has both a subjective and an objective element. Not only must the Defendants have acted believing that the strip search is here were lawful [sic], but also this belief must have been a reasonable one in light of all the circumstances.

The relevant question is whether the Defendant knew or reasonably should have known that the action that they took within their spheres of official responsibility would violate the Constitutional Rights of Plaintiffs or, if they took the action with malicious intentions to cause a deprivation of Constitutional Rights or other injury to the Plaintiff. With respect to each Defendant the question is not only whether he acted with a good faith intent, but also whether he had reasonable grounds for the belief formed at the time in the light of all circumstances that his conduct was Constitutional.

It is not enough that a Defendant may have acted sincerely and with the belief that he was doing right, for an act violating Constitutional Rights can be no more justified by ignorance or disregard of settled, indisputable law than by the presence of actual malice. Thus, a Defendant must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic unquestioned Constitutional Rights of his charges. Basic authorities for the legal principles of good faith which I have just enunciated are Wood against Strickland, O'Connor against Donaldson, Scheuer against Rhodes, and the Second Circuit case of Laverne against Corning.

At this stage of the case, the question on the motions for a directed verdict is whether the evidence presented raises a question of fact with respect to the good faith of the Defendant, or whether that question may be resolved as a matter of law, thereby requiring a directed verdict under Rule 50 of the Federal Rules of Civil

Procedure. The standard for a directed verdict has been stated by our Circuit Court of Appeals as follows: "It is whether the evidence is such that without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men and women could have reached."

Here there is no substantial issue of credibility. Indeed, the essential facts are undisputed. I have determined that on this record reasonable men and women could reach but one conclusion; namely that the Defendants Corso and Weeks acted in good faith both subjectively and objectively and are thereby immune from damages for the Constitutional wrong inflicted upon the Plaintiffs.

The Plaintiffs do not even press a claim here of subjective bad faith, nor could they on this record. As to the Defendant Weeks: She knew neither Plaintiff prior to the events in question. There is no evidence of any abuse of either Plaintiff by Mrs. Weeks. The search was done in the privacy of a cell with only Mrs. Weeks present at the door, with the one exception of Mrs. Micallef when another woman, a Deputy, appeared briefly. There are no circumstances in the evidence even to suggest any malice or vindictiveness on the part of Mrs. Weeks. She was performing what she understood to be a standard policy which was uniformly applied to all persons without regard to the offense with which they were charged or to any other circumstances. In short, she was doing her job as viewed and required by her superiors.

As to former Sheriff Corso: He too knew nothing of either Plaintiff prior to the incidents in question. Indeed, he didn't know of the particular incidents themselves until complaints of one sort or another had been made, thus bringing the matter to his attention. He had had some 30 years in law enforcement. The search procedure which was in effect while he was Sheriff was a standard practice in many communities. It predated his coming to the Sheriff's office. It was still in effect when he left. While he did not establish the procedure, he unquestionably was responsible for it, because he and he alone was able to change it. But did not change it [sic], and it was his view, unquestioned in terms of his subjective state of mind, that it was a necessary and Constitutional procedure to be performed on all people who had been arrested and brought to the facility.

On this record, clearly and undisputably, Sheriff Corso had a sincere, subjective belief that the security of the jail warranted the procedure which was used.

On the question of objective good faith, the argument presented by the Defendants is that we are dealing here with a developing field of law which has been changing rapidly. They have argued strenuously that the procedure employed was not Unconstitutional in 1974 and indeed it is not Unconstitutional even now. They have argued that even if it is Unconstitutional at the present time, there is no basis for holding the Defendants to such a standard in 1974, in the absence of any definitive higher Court ruling on the issue.

The Plaintiffs' claim on the question of objective good faith is essentially that the procedure which was employed was so humiliating, so degrading, so shocking that it should have been self-evident to the Sheriff and to Deputy Weeks that it was Unconstitutional. In determining whether or not the Defendants should have known that this procedure was Unconstitutional, all of the applicable circumstances must be considered. I note that as of 1974 there apparently had been no Court decisions anywhere in the Country determining the Constitutionality of search procedures as applied to a Detention Facility. If there has been such a decision, Counsel have not brought it to my attention, nor has the research of my Chambers been able to uncover it, even using the "Lexis" computer.

There has been no Supreme Court Decision even to date on strip searches of any type. In December, 1973, some seven or eight months prior to the incident in question, the United States Supreme Court handed down two decisions where they spoke of "full body searches" which were incident to traffic arrests. Those two cases were United States against Robinson and Gustafson against Florida. In both of those cases the Supreme Court upheld the use of a "full body search" in conjunction with a traffic arrest. Apparently from the decisions, what was described there as a full body search, was a "pat frisk" in the terminology I defined at the opening of this decision. Not clear from those decisions from the highest Court of the land was any hint as to the Constitutionality of the kind of search procedure we're dealing with here.

As of 1974 there was extensive use of strip searches around the Country. There was brought to our attention by the Plaintiff's expert, Mr. Goff, that the procedure was nearly universal in this Country some 20 years ago. I believe he said in the late 50's, New Jersey abandoned the procedure. He described for us a trend, which might be characterized as one of the developing sensitivities on the part of prison officials towards the needs, desires, problems of persons in custody. It is true that in December 1974 a strip search, not of a prisoner, but of a visitor at the Erie County Jail was invalidated by Judge Curtin of the Western District of New York.

In the same Court in which I sit, in the Eastern District of New York, there was also a decision in December of 1974, where a strip search performed upon a woman seven months pregnant causing considerable pain, and imposed as a routine practice, was held to be an unreasonable search.

In May of 1974 a prison employee who was suspected of smuggling contraband was then subjected to a strip search, but he lost his 1983 action to recover damages. Those are the cases which were at or about the time of the events in question.

The cases relied on most heavily by the Plaintiffs are Frazier and Wolfish. Frazier was decided in February, 1977. Wolfish was decided September of 1977. Both are, of course, Trial Court decisions. There are no Circuit Court decisions on the point, except possibly Preiser against Sostre, decided in 1975, again after the events in question here and involving a

visual rectal and anal inspection of prisoners within prison facilities. But even there it seems that the concern of the Circuit Court of Appeals was as much with the discriminatory application of the procedure as it was with any claim of inherent Unconstitutionality.

In McKinnon against Peterson which I referred to earlier, the Second Circuit in its slip opinion dated September 15th, 1977, addressed itself tc a claimed deprivation of Constitutional Rights in connection with whether or not sufficient notice had been given of a prisoner's disciplinary hearing. The Court referred to the good faith-qualified immunity defense, discused particularly Wood against Strickland, and noted as follows: "We are not convinced the standard of Wood against Strickland has been met here. At the time of the hearings in question, the contours of prisoners' procedural rights were just starting to take shape. If the hearings were less than we consider Constitutionally adequate today, it is because of the benefit of hindsight and particularly the guiding light of Wolf against McDonald," (which was a Supreme Court decision requiring 24 hours notice of such disciplinary hearings). The Second Circuit continues, "The cases which Plaintiffs cite to indicate that the Constitutional Rights here in question are clearly established and in question in June 1973 deal with forms of punishment harsher and of longer duration than two weeks in keep lock. These cases indicated that the Courts were only beginning to fill in the details of procedural due process required in the context of prison discipline."

By analogy to the circumstances of this case it is clear as a matter of law that at the time of the incidents in question here, the contours of the requirements of due process and the Fourth Amendment reasonable search requirement, in the context of strip searches, have only begun to take shape.

As I indicated earlier there are two close decisions, which are the ones decided in 1977, Frazier and Wolfish. Most of the other decisions dealt not with routine procedure, but special circumstances such as abusive conduct and some elements of personal malice perhaps. This area of the law has been developing extremely rapidly; there are no definitive decisions on strip searches with visual inspections applicable even to incarcerated prisoners who have already been sentenced, not to mention "Pre-arraignment Detainees."

As the Plaintiffs themselves have pointed out to me, this is a case of first impression involving Detention Facilities. With respect to Plaintiff's argument that the procedure used is so outrageous as to make it self-evident that it is Unconstitutional, I would also point out the following:

The claim is that the procedure is humiliating, degrading, shocking and disgusting, so much so that no one could conceivably consider it to be Constitutional. However, 20 years ago the procedure was a universal practice and not until 1965 was any significant publicity focused upon the procedure.

The fact that we have a case of first impression argues against a claim of self-evident Constitutionality. The fact that the only solid cases in the field are less than two years old, and even those do not involve Detention Facilities, also argues against self-evident Unconstitutionality. Perhaps most eloquent is the fact that there is no evidence of any complaints made of the procedure to the Suffolk County Sheriff's Department, or for that matter, there is no evidence of any complaints to any Agency in Suffolk County with respect to this procedure at any time prior to the complaint of these two Plaintiffs.

It is clear as a matter of law that the Unconstitutionality of that procedure which I have now determined was not self-evident in 1974, and perhaps is not even self-evident today. However, the trend toward an elimination of this procedure is obviously continuing and it will go further as long as our society demands that its institutions adjust their methods and procedures in order to accomodate human needs. Hopefully, this decision will advance that trend.

Officially, therefore, the Defendants' motion for a directed verdict is granted and the Plaintiffs' motion for a directed verdict is denied. There are some loose ends which should be covered.

The claim has been argued or has been discussed by me as if it were under Section 1983 of Title 42 of the United States Code. It is in the context of that

statute that the good faith defense has been raised, discussed and decided. There is a question under 1983 as to whether a Municipality may be held liable for the acts of its agents. The settled law in the Second Circuit is that a Municipality or Corporation is not a person within the meaning of Section 1983 and therefore may not be held liable.

In other words, the liability is personal under 1983, but some other Circuits disagree. That issue is currently pending before the United States Supreme Court and may be determined sometime before the Summer. The alternate theory of liability, a direct claim under the Fourteenth Amendment which says that no State may deprive a person of life, liberty or property, without due process of law, is also up in the air. The Second Circuit in Gentile against Wallen has held that a claim against a Municipality based upon a claimed deprivation of Constitutional rights under the Fourteenth Amendment, similar to a 1983 claim, does state a cause of action. The Second Circuit expressly withheld decision on whether that cause of action would warrant only injunctive relief or whether it would also include damage relief. By granting the Defendant's motion for a directed verdict, I have necessarily held that the Plaintiffs have not made out a case sufficient to go to the Jury under the Fourteenth Amendment.

In the event that this decision is subject to review on appeal it should appear clearly that I have applied the same analysis with respect to the good faith defense to the Fourteenth Amendment claim as I have done under 1983.

I recognize that perhaps different policy considerations may weigh when dealing with the claim for damages against a Municipal Corporation as opposed to the Sheriff individually or the Deputy Sheriff of the Police Commissioner or some other Public Officer.

The question has not been briefed for me. It has been touched upon peripherally in some of the oral discussions which I've had with Counsel both on and off the record.

But, without any in depth analysis, I have assumed for purposes of this decision that a Fourteenth Amendment claim for damages would lie under the authority of Gentile against Wallen, but that the same considerations with respect to a qualified immunity would also apply.

There remains the question of Attorney's fees. Section 1988 authorizes the awarding of Attorney's fees in an action brought under 1983. The fees may go to the successful party. The statute is a Congressional recognition at the time it was enacted in late 1976, of a growing feeling that Attorneys playing the role of "private Attorneys General" should be compensated for their efforts in defending or prosecuting claims involving substantial Constitutional rights. In my view there is no question that this case deals with substantial Constitutional rights. While I have found no monetary liability on the part of the Defendants, because I have determined that their good faith appeared on this record as a matter of law, it appears to me that the function which Counsel have served in prosecuting these two law suits has been to bring to the

surface for public and judicial scrutiny, and for official scrutiny within the administrative structure of the County, a practice and procedure which, however it may have been viewed ten or twenty years ago, is now repugnant to persons of sensitivity, unless called for by reasonable and rational needs for protecting the security of a prison facility or for other reasons to protect the safety of law enforcement officers.

Until today there was no suggestion that I'm aware of, anywhere in these proceedings, which have been pending since early 1975, that the search procedure had in any way been changed by the Defendants. My understanding at the present is that if the procedure were changed under the pressure or as a result of this law suit, Plaintiffs' Counsel would presumptively be entitled to appropriate Counsel fees for having brought about such a change in the public interest. I am unable to determine on the state of the record before me precisely what all the circumstances are particularly in view of the last minute developments, just before the luncheon recess. So, I will reserve for further consideration with Counsel, the question of Counsel fees to be awarded to the Plaintiffs' attorneys, both as to the propriety of them, which on my understanding of the law, are presumptively to be awarded under the circumstances, and, as to the amount of such fees. Included in the amount might well be an analysis of the services rendered and whether or not there was any awareness on the part of Plaintiffs' Counsel of the change in procedure at some time prior to today.

That concludes my decision. With respect

to the injunction, we have to find out what the circumstances are, and determine whether there is a need for an injunction. Whether there is or there is not, I think Plaintiffs' Counsel are presumptively entitled to Attorney's fees under the statute as interpreted by the Second Circuit.

I would direct Defendants' Counsel to investigate what the current procedure is at the Happaugue Facility and to submit within two weeks an affidavit from a person having knowledge of the facts, describing the procedure in detail and specifying whether or not the strip search procedure as we have had it described here is applied to petty offenses, and if so, under what circumstances. After I read that affidavit I will be in touch with Counsel to determine what, if any, argument I will need in connection with whether or not an injunction would be appropriate, and if I determine that an injunction is appropriate, I will then request Defense Counsel to submit their proposal for how the decree should read, and will give Plaintiff's Counsel an opportunity to comment upon the Defendant's submission, and also to submit any counter-proposals which they may have. After the question of injunctive relief has been determined, I will take up the question of Counsel fees.

That constitutes the Court's decision.

79-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DIANE SALA,

Petitioner,

against

COUNTY OF SUFFOLK,

Respondent.

BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DIANE SALA,

Petitioner,

against

COUNTY OF SUFFOLK,

Respondent.

AFFIDAVIT IN OPPOSITION TO PETITIONER'S MOTION FOR EXPEDITED CONSIDERATION AND CONSOLIDATION

Respondent opposes petitioner's application for expedited consideration and consolidation so that the above entitled matter might be considered together with *Owen* v. *City of Independence, Missouri,* 589 F.2d 335 (8th Cir. 1978), *cert.* granted, No. 78-1779, 48 U.S.L.W. 3189 (October 1, 1979) because while both cases turned on the

court's finding that a good faith defense did exist so that a municipality had a qualified immunity the alleged constitutional violations are entirely different. Contrary to petitioner's assertion the important factual differences speak for the proposition that confusion rather than judicial efficiency would result.

While *Owen* involves an alleged due process violation and *Sala* involves an alleged violation of the Fourth Amendment the court could not avoid a thorough examination of the underlying policy considerations which are many.

The questions posed in petitioner's application for a writ can be answered without the court consolidating the cases. Since the court has agreed to review *Owen* presumably to further define the parameters of municipal liability no need exists for the court to grant the application for certiorari or the subject motion for consolidation and expedited consideration.

Respectfully submitted,

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November 9, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

DIANE SALA,

Petitioner,

against

COUNTY OF SUFFOLK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent County of Suffolk opposes petitioner's application for a writ of certiorari seeking review of the judgment of the Court of Appeals for the Second Circuit entered in this case on August 17, 1979. Respondent also opposes any consolidation or expedition of this case for the purpose of considering *Owen* v. *City of Independence, Missouri,* No. 78-1779, cert. granted October 1, 1979 simultaneously.

Questions Presented

1. Whether a municipality may invoke a good faith defense in an action brought under 42 U.S.C. 1983.

2. Whether the public interest in careful, but forceful, governmental decision making requires that a municipality be afforded a qualified limited immunity from liability for damages under 42 U.S.C. 1983.

3. Whether the strip-search procedure for pre-trial detainees was constitutional when performed in that it was believed necessary and rationally related to the purpose for which it was conducted.

Statement of the Case

The statement in petitioner's application correctly recites the facts of the case, but certain opinions and inferences contained therein require comment.

The petitioner alleges that suit was brought after she was subjected to an "insensitive, demeaning and stupid" strip search. Although the plaintiff's subjective opinion is not disputed the respondent reiterates its contention that the search was performed in a manner best suited to minimize any degradation on the part of the petitioner. The petitioner also infers that the search was improper because the officer lacked probable cause or suspicion that the detainee possessed dangerous weapons or illegal contraband. Clearly the situation didn't permit the matron to form any conclusions as to who should and should not be searched. The procedure was administrative and applied with equality to any detainee.

The petitioner allegedly quoting the decision of the District Court asserts that numerous less offensive methods could have been exercised. The respondent disputes this contention; while other methods are possible and are now employed they are not as effective and will not detect various non-metalic items such as drugs and money.

The injunctive relief was not necessary in order to prevent further strip searches. The County voluntarily discontinued its policy before this matter ever came to trial.

The District Court ruled that a strip search as conducted on pre-arraignment detainees was unconstitutional, but afforded a good faith defense to the defendants because the alleged unconstitutionality was neither self-evident nor deemed discernable by able constitutional lawyers. Whether or not this search was in fact unconstitutional is still open to conjecture in light of the recently decided case, *Bell* v. *Wolfish,* 47 U.S.L.W. 4507. (May 14, 1979).

Reasons for Denying the Writ

Certiorari should not be granted in this instance because if the court wishes to make a pronouncement regarding the good faith defense as it is to be applied to municipalities it can do so in its decision in *Owen* v. *City of Independence, Missouri,* No. 78-1779, cert. granted. October 1, 1979. The facts in *Owen* are entirely different than the facts in *Sala,* however the good faith defense and the qualified immunity which is found to exist are nearly identical. *Owen* concerns the municipality's alleged wrongful termination of its police commissioner and the failure to afford the commissioner a hearing at which he

might clear his name. The 8th Circuit Court of Appeals recognized that no case law existed at the time the commissioner was terminated which entitled him to such a hearing. Since no cases existed to indicate the policy was unconstitutional the municipality should not have been aware they acted in an unconstitutional manner. Thus since the two circuits are not in conflict and the immunity is nearly identical there is no need to grant certiorari.

Further, there is no social course to be satisfied and no promise of deterence. The County had discontinued the procedure prior to the trial of the action. In regards to injuries, no measurable degree of harm is present in *Sala* which is not present in *Owen.*

The County is no longer following the procedures which required the strip search. Thus imposing liability would not in any way act as a deterent. The policy was not obviously unconstitutional and if examined prior to the *Sala* decision or even the arrest of the petitioner its alleged unconstitutionality would not have been evident. Thus it can't deter unconstitutional policies which are not reasonably predictable as to there unconstitutionality.

Petitioner suggests that *Sala,* being a long standing policy, offers itself to a more stringent review. On the contrary, *Sala* was adopted throughout the country and was presumed constitutional by a majority of the states. Since no case existed at the time of the search, the respondent couldn't conclude otherwise.

I.

Where there was no evidence of bad faith on the part of anyone charged with formulating or implementing the alleged unconstitutional policy and no case law suggesting the policy to be unconstitutional the municipality is entitled to a qualified immunity.

While a new avenue of liability may have been created by the decision in *Monell* v. *Department of Social Services,* 436 U.S. 412 (1978), with said liability must come the opportunity to assert the affirmative defense of good faith. Prior to the decision in *Monell,* a municipality was not considered a "person" within the meaning of 42 U.S.C. 1983 so that no liability could attach. *Monell,* was pending when the District Court rendered the decision so that the County was said to enjoy an absolute immunity. However, Hon. Justice George Pratt had the foresight to consider the liability of the County and recognized that some form of a good faith defense could be asserted.

After *Monell* was decided the Second Circuit Court of Appeals considered the within matter and declared that a limited good faith defense must exist. Since a municipality can only act through its elected officials and employees it is clear that officials of the County promulgated the questionable strip search procedures.

In reviewing the policies and the motivation behind each policy the reviewing body must be careful of hindsight. Certainly at the time the policy of performing a visual strip search was propounded by County officials the practice was believed to be constitutional. At the time the procedure was instituted the method was used in a large majority of all detention facilities throughout the nation. This fact was attested to by the petitioner's expert witness. It is clear that at the time the policy was

promulgated County officials rightfully believed the policy was constitutional.

The policy continued to exist because it was rationally suited to the protection of detainees and public officers. At the time the search was performed on the petitioner (October 1974) no case law existed which might have put the County on the notice that the procedure might be unconstitutional. Since no case law existed to suggest that the municipal policy was "constitutionally infirm", the municipality was not at fault (8a).

Although the District Court opinion declares the policy of strip searching pre-arraignment detainees to be unconstitutional, this decision is subject to reconsideration in light of *Bell* v. *Wolfish,* 47 U.S.L.W. 4507 (May 14, 1979). The County doesn't seek to review the decision of the District Court in so far as it declares the policy to be unconstitutional since it has and in fact had at the time of trial abandoned the practice. However, the *Bell* decision does stand as proof of the uncertain status of the law even at this date.

Since the policy was rationally related to the designed purpose the argument for constitutionality is not shallow. The fact that contraband was discovered only infrequently may be evidence of the effectiveness of the procedure. Although the County has abandoned the procedure the alternate methods suggested are not without their drawbacks. Devices such as metal detectors would not detect non-metalic contraband; and X-Ray may prove hazardous to the detainee's health.

The search should not have been declared to be unconstitutional, as it was reasonable and necessary and rationally suited to its purpose.

Since the County had already abandoned the policy of performing strip-searches on pre-arraignment detainees

prior to trial no injunction was required to eliminate the policy. The County's good faith is supported by the fact that they ceased upon the very questioning of the constitutionality of the matter. The court, however, rightfully concluded it was not reasonably predictable that said policies would infringe on the detainee's constitutional interests.

The petitioner implies that the search must be limited to situations where there might be probable cause to suggest that the detainee was concealing contraband. In fact the authority to search a person arrested springs from the arrest itself and has been said to extend to a full search of the individual. See *United States* v. *Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed. 2d 427 (1973).

The courts are not assigned the role of administering the nations prisons, but are to guard against violations of the Constitution.

> "Since problems that arise in the day to day operation of a corrections facility are not susceptible of easy solutions, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell* v. *Wolfish,* 47 U.S.L.W. 4507

The *Bell* case involves pre-trial detainees so that considerations are not the exact same. However, *Bell* declared that body cavity searches on pre-trial detainees did not violate the Fourth Amendment.

What effect that might have on this litigation is not the issue which is to be resolved. The search now in

question was performed only once and there is no inference that the search had a purpose of punishing or embarrassing the detainee. Since the incarceration was lawful, and there is no doubt that the petitioner was lawfully incarcerated, there was a necessary withdrawal or limitation on many privileges or rights. Such a retraction was justified by the exigencies of our penal system.

Since the Fourth Amendment prohibits only unreasonable searches, the search was reasonable as it was pursuant to a lawful arrest. The court needs to consider all of the factors; the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted. In all aspects the search was performed with restraint and with a genuine effort to minimize embarrassment.

Finally, and most persuasive is the fact that neither the Suffolk County Sheriff's Office nor any other agency received a complaint regarding this policy prior to the *consideration of this* matter being reviewed together with the case of *Micaleff* v. *County of Suffolk,* which was consolidated and tried with this matter.

Agreeably, a detainee needn't be the sole guardian of his constitutional rights, but the situation is probative regarding the manner and attitude of the County. Clearly no impermissible motivation or disregard of the petitioner's rights can be shown.

II.

The public interest in careful, but forceful, governmental decision making requires that a municipality be afforded a qualified immunity.

A qualified immunity based on respondent's successful assertion of the good faith affirmative defense properly exists. The *Monell* decision changed the recognized principle of law that municipal bodies were not included within the class of "persons" subject to 42 USC 1983. However, it would be wrong to conclude that a previous absolute immunity had given way to a doctrine of liability without fault (8a). The *Monell* decision doesn't define or even declare a good faith immunity defense to exist.

> "Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties or addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under 1983 'be drained of meaning,' Scheur v. Rhodes, 416 U.S. 232, 248 (1974). Cf. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397-398 (1971)" *Monell* v. *Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018.

Monell does infer that some immunity defense may exist, leaving same to be outlined in later cases. The case at bar is a most limited immunity, because the Sheriff, Philip Corso, who had the power to change the policy on behalf of the County was shown to have acted in good faith and

was thereby immune. Extending said immunity to the municipality is entirely logical. If the procedure was obviously unconstitutional at the time it was initially promulgated the result would of course be different. However, the procedure was not then, nor at the time of the subject search, unconstitutional. No malice is suggested and no ignorance of case law is maintained.

In fact the Sheriff could not have been advised that policy was unconstitutional. The leading case in support of an officials duty to make himself aware is *Wood* v. *Strickland,* 420 U.S. 308 which declared:

> "The official himself must be acting sincerely and with a belief that he is doing right but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice." *Wood* v. *Strickland,* 420 US p 321.

Thus it is clear that no requirement is being made that officials become constitutional experts or clairvoyants able to anticipate evolving constitutional doctrine." See *Pierson* v. *Ray,* 386 U.S. 547. As no cases evidenced the alleged unconstitutionality at the time of the search and the policy was validly presumed constitutional the County of Suffolk may rightfully assert a good faith defense and enjoy a qualified immunity from damages under 42 U.S.C. 1983.

III.

Certiorari should be denied.

Petitioner's application for certiorari should be denied. The issues in *Owen,* supra and *Sala* are very different and a careful exercise of the courts discretion should result in a denial of the petition for certiorari.

In regards to the issue of a qualified immunity based on the affirmative defense of good faith the cases do not conflict. A frequently cited grounds for the granting of certiorari is a situation when two Circuit Courts of Appeal have rendered conflicting decisions on a constitutional issue. This is not the case and in fact *Owen* and *Sala* are compatible. Both cases granted a qualified immunity where the alleged unconstitutionality could not be gleaned from case law at the time of the alleged violation.

A further reason to deny certiorari is that while respondent doesn't intend to pursue affirmative steps to appeal the finding that the search was unconstitutional, the respondent will assert, in light of *Bell* v. *Wolfish,* supra that the strip search was constitutional and not a violation of the Fourth Amendment.

The respondent has abandoned the strip-search procedure and as the law now stands the strip-search is unconstitutional as to pre-arraignment detainees. Clearly nothing is to be gained by a grant of certiorari which would require the court to both consider the good faith defense in *Owen* and to reconsider the constitutionality of strip-search in *Sala.* The court can define the "good faith" defense by deciding *Owen* without considering *Sala* which contains issues which go beyond municipal immunity.

While *Owen* involves the alleged wrongful termination of the municipalities police commissioner and the failure to afford him a "name clearing hearing" the immunity

issue is nearly the same. In both cases the officials of the municipality would have had to have anticipated future decisions which declared there actions to be of questionable constitutionality.

Contrary to petitioner's assertion the action taken in *Owen* represents a better opportunity to begin to define a limited municipal immunity because the time and place of the promulgation of the alleged unconstitutional policy and exercise of such power are closer in time.

CONCLUSION

The petition for a writ of certiorari should be denied because the respondent enjoys a qualified immunity.

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